Computing Compensation for Extinguishing Native Title in Australia

This note explains *Northern Territory v Griffiths* [2019] HCA 7 (13 March 2019) ("*Griffiths*"), a methodologically complex and lengthy opinion, and why it is significant. As a native title case concerning land valuation in the northwestern corner of the Northern Territory in Australia, it is essential for other settler states that also have native title. That is because *Griffiths* is the first case from the High Court of Australia that articulates how to compute compensation owed to Aboriginal and Torres Strait Islander peoples for the extinguishment of native title rights under the Native Title Act 1993.

Abbreviated Legal Background

Australia's Commonwealth passed the Racial Discrimination Act 1975 (Cth) ("RDA") to give effect to the International Covenant on the Elimination of Racial Discrimination. In 1982, Eddie Mabo and other petitioners from the Murray Islands initiated litigation to affirm their native title rights. In response, the Queensland legislature passed an act that sought to extinguish any native title in the Murray Islands by retroactively declaring title over them in 1879. In *Mabo v Queensland (No. 1)* (1988) 166 CLR 186, the High Court found that act violated the RDA. The subsequent *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 ("*Mabo No. 2*") established that Australian common law could recognise Aboriginal and Torres Strait Islander peoples' relational to land as native title. Like pronouncements of native title in Canada and New Zealand, Australia's recognition of native title did not unsettle the Crown's acquisition of sovereignty over land (at[45] Brennan J). It undermined *terra nullius* as the doctrinal justification for colonisation. It also maintained that native title and Crown sovereignty can co-exist where the Crown had not yet extinguished native title through a "clear and plain intention" to do so (at [75]).

In response to *Mabo*, the Commonwealth Parliament passed the Native Title Act 1993 (Cth) ("NTA") to recognise, protect, determine or otherwise extinguish native title. Under the NTA, as initially passed, extinguishment may have already occurred, called past acts, or may occur in the future, which are called future acts. *Griffiths* is only concerned with compensation for extinguishment for past acts. A subsequent amendment to the NTA extended the period included in "past acts" from 1 January 1994 to 23 December 1996, called "intermediary acts". Given that the NTA was in response to *Mabo No. 2*, which itself arises from within an anti-discriminatory framework passed in 1975, the applicable time frame for past acts is from 1975 to 1996.

Factual Background

The town of Timber Creek was proclaimed in 1975 (*Griffiths*, at [5]). The Victoria River is the border on one side, with the other three sides bounded by lands granted under the Aboriginal Lands Acts (Northern Territory) 1976. The town has a population of 230 people, approximately 2/3rds of which are Aboriginal individuals (ibid). In 1999 and 2000, a Claim Group initiated native title claims, which established that between 1980 and 1996, the Northern Territory was responsible for 53 acts that impaired or extinguished native title rights (at [6]-[7]). Following that litigation, in 2011, the Claim Group instituted a claim for compensation under the NTA (at [8]).

The Claim Group asked the High Court to 1) value the economic loss of native title as equivalent to the compulsory acquisition of freehold estate, 2) calculate interest at a superannuation rate or on a compound "risk free rate" for long-term government bonds, and 3) value the non-economic loss in accordance with the Northern Territory's Lands Acquisition Act (at[11]).

At first instance, the Trial Judge assessed the economic value at 80% of the value of freehold ($512,400), computed simple interest based on the practice note rate starting from the date of extinguishment to judgment (approximately $1.5 million), and computed compensation for non-economic loss at $1.3 million (at [12]). On appeal, the Full Federal Court assessed the economic value at 65% of the value of freehold, applied a simple interest computation (which was a lesser amount due to the reduced economic value), and accepted the Trial Judge's valuation of non-economic damages (at [13]).

Both sides appealed to the High Court. It answered "how the objective economic value of the affect native title rights and interests is to be ascertained", how to compute interest, and, third, how to value the claim group's sense of loss of "traditional attachment to the land or connection to country" (at [11]).

High Court Opinion

The decision is comprised of a joint judgment of Kiefel CJ, Bell, Keane, Nettle, and Gordon ("joint justices"), with Gageler and Edelman JJ penning separate judgments. Concerning the three issues, the High Court further reduced the percentage from 65% to 50% in comparison to the freehold value. However, it upheld interest computation on a simple basis and a $1.3 million award for compensation of non-economic or cultural losses.

As the litigating parties agreed that the Northern Territory had extinguished the Claim Group's native title rights and interests, the question was how to compute the value of those extinguished rights and interests. The NTA states that physical/material (economic) and cultural/spiritual (non-economic) aspects of native title are compensable (at [44] citing NTA ss 51(1), 223(1)). However, the NTA also caps the amount of total compensation for extinguishment at "the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate" (at [49]). At the same time, a "shipwrecks clause" that ensures

all infringements of property rights are compensated under Constitution s 51(xxxi). Furthermore, NTA sections 51(2) and (4) enable those determining compensation to include in their valuation non-economic features, like solatium, or what the joint justices call "cultural loss" (at [51]-[54]). Accordingly, the High Court sought to determine the compensable economic value, interest, and cultural losses related to the extinguishment of native title rights and interests.

Economic Losses

The joint justices began their analysis of economic losses by acknowledging that, at common law, "freehold ownership or, more precisely, an estate in fee simple is the most ample estate which can exist in land" (at [67]). It continued, "lesser estates in land confer lesser rights to land and, therefore, a lesser degree of power exercisable over the land; and for that reason, they ordinarily have a lesser economic value than a fee simple interest in land" (at [67]). This understanding of what is the most valuable or less valuable is useful for understanding how to appropriately value native title. Although the joint justices note that "[n]ative title rights and interests are not the same as common law proprietary rights…the common law's conception of property as comprised of a 'bundle of rights' is translatable to native title" (at [68]). Native title rights can be exclusive and somewhat similar to freehold ownership, but they can also be a lesser form of rights and interests. Relying upon the Trial Judge's findings that the Claim Group's rights and interests were usufructuary, ceremonial and non-exclusive (at [69]), the joint justices saw their task as that of assigning a "percentage reduction from full exclusive native title … and then the application if that percentage reduction to full freehold value as proxy for the economic value of full exclusive native title" (at [70]).

The Trial Judge assessed the Claim Group's rights and interests at 80% of freehold value and the Full Federal Court at 65%. The Claim Group asserted that the Full Federal Court's method of calculation violated the RDA in two ways. It claimed, first, that its treatment

of native title was not equal to other forms of title and, hence, discriminatory. The joint justices denied this claim. It found that non-exclusive native title is valued differently from exclusive native title, but that in itself does not mean non-exclusive native title must be valued as freehold title (at [72]-[74]). The RDA "requires… parity of treatment and there is no disparity of treatment if the economic value of native title rights and interests is assessed in accordance with conventional tools of economic valuation adapted as necessary to accommodate the unique character or native title rights and interests and the statutory context" (at [75]).

Second, the Claim Group argued that the RDA "precluded the Northern Territory from granting any further interest in the land unless the same interest could have been granted over freehold or leasehold land" (at [77]). Again, the joint justices disagreed. It found that the NTA was amended in 1998 to include a definition of "non-exclusive possession act" (at [79]). If the Claim Group's argument were an accurate statement of native title law, then non-exclusive uses of land legally permitted by the 1998 amendments would have either been prohibited by the RDA or would have entirely extinguished any conflicting native title (at [79]). That cannot be, so joint justices rejected the Claim Group's argument.

With the RDA claims dismissed, the joint justices then discussed how to compute the economic value. The Trial Judge had assessed the value at 80% of the freehold value. The Full Federal Court held that the Trial Judge had failed to appropriately discount the Claim Group's native title rights and interests as it is irrelevant that native title rights are inalienable. Therefore, it applied the *Spencer* test: "what a willing but not anxious purchaser would have been prepared to pay to a willing but not vendor to secure the extinguishment of those rights and interests" (at [64]). The joint justices applied the same test but found that the Full Federal Court's valuation was still too generous. Because the NTA "equates the economic value of full exclusive native title to the economic value of unencumbered, freely alienable freehold title", alienability would, similarly, be irrelevant for economic valuations of non-exclusive native title

(at [100]-[102]). As the Claim Group's rights and interests were "essentially usufructuary, ceremonial and non-exclusive" and did not have rights of admission, exclusion, or exploitation, the value "could certainly have been no more than 50 per cent" (at [106]).

Interest

The parties agreed that interest should be awarded on the economic loss to reflect the losses arises from the time difference between the extinguishment of the native title rights and the award of compensation. They disagreed about how to compute interest. The Claim Group requested compound interest, which the Trial Judge rejected. It noted that there was no basis for establishing that compound interest "was an appropriate means of securing fair compensation or compensation on just terms" (at [110]).

On appeal, the Claim Group argued that the Northern Territory owed compound interest because the Northern Territory was a fiduciary (at [111]). The joint justices, following the Full Federal Court's reasoning, rejected that argument (at [126]). It held that the NTA "provides for the validation of certain acts that impair or extinguish native title, [which] tend against the conclusion that fiduciary obligations exist or that an analogy to such obligations is appropriate" (at [131]).

The Claim Group's second argument was that the Northern Territory owed compound interest because it had used their land for over a decade before extinguishment had been acknowledged (in 1994). The basis for that argument was that the Northern Territory had used their land for over a decade passed before Australia acknowledged that extinguishment was valid, so those extinguishing acts had been invalid. The Northern Territory's unlawfully use of land for more than a decade should, it was argued, give rise to a compound interest basis in the same that those who obtain money by fraud or in breach of fiduciary duty owe compound interest (at [131]). The joint justices disagreed. It asserted that because of "the retrospective

validation of the compensable acts, those acts must now be taken as always having been valid" (at [132]).

The Claim Group's third argument was that there was a free-standing entitlement to redress the injustice of the Northern Territory deriving rents and profits from the land subject to extinguished. Again, the joint justices disagreed. It held that if statutes provide for simple, but not compound interest, then equity will not supplement the statute (at [135]). Restitution awards compound interest for unlawful enrichment. However, that claim had not been brought (at [136]). Also, the statutory validation of those acts means that any benefit the Northern Territory derived from those acts were not unjust (at [137]).

Non-Economic or 'Cultural Loss'

The most anticipated aspect of the judgment was how the judges would calculate compensation for the "non-economic effect of compensable acts…which is inherent in the thing that has been lost, diminished, impaired or otherwise affected". The joint justices called these "cultural losses" to avoid detracting from what they are (at [154]). After reviewing the Trial Judge's opinion, the joint justices employed a similar valuation.

The Trial Judge adopted a two-step process. The first was to identify "the nature and extent of the native title holders' connection or relationship with the land and waters by their laws and customs" and then "considered the effect of the compensable acts on that connection" (at [159]). Because European settlers established cattle stations in the late nineteenth century leading to the area of Timber Creek becoming "an important centre…from the 1930s", the Claim Group's enjoyment of their traditional lands had already been partially impaired before the compensable acts occurred (at [163]). Accordingly, the Claim Group was entitled to compensation for the loss caused by the compensable acts after 1975, but not for any loss generally derived from a loss of access to country in the town of Timber Creek (at [164]). That

calculation requires attending to the nature and timing of the compensable acts, its "incremental and cumulative" consequences from 1975 onward (at [165]), and its effects on the Claim Group's interests (at [166]).

The Trial Judge received uncontested evidence that the native title holders "were linked to the claim area through ancestral ties", they continue to "observe essentially the same rituals and ceremonies", and "share a set of beliefs that govern the rights and obligations of Indigenous persons" including their relationship, "duty and concern to look after country" (at [168]). The Trial Judge extensively referenced expert anthropologists' reports on traditional and customary laws and customs (at [169]-[176]). It further described how the compensable acts effected the Claim Group's peoples (the Ngaliwurru and Nungali Peoples) by reference to four events that were "not the direct result of compensable acts" (at [177]-[184]). That aided in establishing how Ngaliwurru and Nungali Peoples experienced cultural loss. The Trial Judge also "referred generally" to the Claim Group's evidence, including affidavit and oral evidence, to understand the effects of the compensable acts (at [185]-[195]). With this information, the Trial Judge "rejected the contention that there could be a significant area of landscape that is unimportant to Aboriginal peoples, or that there would be an area devoid of spirituality, stating that such a contention 'defies logic in the Aboriginal tradition'" (at [197]). Instead, the Trial Judge noted that the effects "had to be understood by the bond that existed between a person and the spirituality of country", which requires appreciating that the consequences "were necessarily incremental and cumulative" rather than adopting "a lot by lot approach" (at [198]).

After considering that evidence, the Trial Judge considered the effects of the compensable acts. The effects included consideration that: dispossession would continue and persistently aggravate hurt feelings, erecting fencing and buildings impacted the rights and interests including "destruction and damage" to significant sites to the degree that some areas were "no longer secure ritual ground", which, in total, impeded the Claim Group's ability "to

practise their traditions and customs" (at [190]). The evidence "revealed not only a duty but also a concern to look after country", as well as the Claim Group's "gut-wrenching pain and deep or primary emotions accompanied by anxiety" (at [194]).

The Trial Judge assessed the level of compensation at $1.3 million (at [208]). In support of that amount, the Trial Judge made special reference to "three particular considerations" of significance to the assessment – construction of water tanks on the path of the Dingo Dreaming, "the extent to which certain of the compensable acts affected not only the precise geographical area…but, in a more general way, related areas", and the "chipping away" of the incremental detriment to the enjoyment of the rights (at [200]-[207]).

The Commonwealth and the Northern Territory appealed, challenging the analysis of the "three particular considerations" and that the amount was "manifestly excessive", which the Full Federal Court rejected (at [209]-[210]). On appeal to the High Court, the joint justices began by explaining that some aspects were not disputed, including that "an award for cultural loss was appropriate", it "was to be made on an *in globo* basis", it would reflect the native title holders at the time native title was determined, and any assessment could not "be divorced from the content of the traditional laws and customs" of the Claim Group (at [214]).

Under the section 51(1) of the NTA, a court must identify the compensable acts, and then "determine the essentially spiritual relationship [a Claim Group] had with their country and to translate the spiritual hurt caused by the compensable acts into compensation" (at [216]). By contrast, the Commonwealth and the Northern Territory argued for a different method for assessing compensation. Their method would identify the compensable acts and then "impose[] specific temporal and physical limits which do not extend to collateral detrimental effects" (at [216]). Effectively, that would have prevented the Trial Judge from valuing general or holistic effects. The joint justices held the Trial Judge did not make an error of law and, also, that the award was not manifestly excessive (at [235]). It held, "[t]here is nothing to suggest that the

trial judge's award would not be accepted by the Australian community as appropriate, fair or just" (at [237]).

Gageler and Edelman JJ

Gageler J agreed with the joint justices' orders and reasons but disagreed with their method for assessing the economic value. Gageler J argued that, even if the value is 50% of the freehold value in this instance, one should not proceed by "discounting" in comparison with freehold value (at [241]-[242]). Instead, Gageler J adopted a different method of valuation that would consider and negotiate the commercial exploitation value (usage value) and the capacity to voluntarily surrender that right (an exit value) (at [243]). The benefit of this approach, according to Gageler J, is that it would avoid the issue of land alienation (at [245]).

Edelman J did not challenge the joint justices' conclusions but preferred a different analysis for every dimension of the opinion. Edelman J sets the tone of his judgment by starting with a quote: "To say that a small farm in the middle of wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to be absurd" (at [251], citing *Inland Revenue Commissions v Clay* [1914] 3 KB 466 at 472). Edelman J then makes it relevant to the case at hand: "[t]o say that the party obtaining the benefit of extinguishment ... should compensate a native title claimant … solely by reference to the ordinary value of the native title to non-Aboriginal persons is absurd" (at [252]).

Although Edelman J acknowledges that there are multiple ways of measuring economic and non-economic losses, he primarily seeks to correct the method of valuation that divides economic losses from cultural losses (at [253]-[254]). That is, economic losses have a value accruing from the date of harm or extinguishment of those native title rights. In contrast, the non-economic loss, which the joint justices initially identify as "solatium" and rebrand as

"cultural loss", is valued at the time of judgment (at [267]). In making this division, the method of valuation is wrong. That is because the economic cost is an "exchange value" – the price that the Northern Territory would reasonably pay to extinguish native title. The second part is then the cultural value that is not captured by the exchange value (at [271]). Neither is dependent on subjective distress or mental suffering, which in common law is solatium (at [272]). The difference is that the cultural loss can happen immediately upon extinguishment. In contrast, solatium or the "non-economic" aspects deriving from pain and suffering quantum in personal injury are not immediate and are to be valued at the time of judgment (at [273]). Edelman J argues that the joint justices' analysis of economic and non-economic values are incorrect.

Economic valuations of exchange value depend on reasonable negotiators willing to partake in negotiations. The problem is that the Trial Judge and Full Federal Court found that the Claim Group was not willing to surrender their rights (at [278]). Accordingly, Edelman J writes, "the position of the Claim Group was a reasonable approach for any person in their position to take in light of the cultural value to them of their rights". Hence, the valuation for economic aspects was not appropriate (at [278]-[279]).

The economic approach is also wrong, given the inalienability of native title. The restriction on alienation is irrelevant when the focus is only upon the price payable by a purchaser who is going to extinguish them and not acquire them. However, "when considering provisions concerned to replicate compensation for compulsory acquisition as nearly as possible, compensation for the extinguishment of a communal usufructuary title, otherwise equivalent to full ownership, is not reduced because that communal title cannot be sold or leased" (at [283]). The exchange values only focus on the price the Northern Territory would reasonably pay, which elides features of native title that are peculiar to the Claim Group, and which do not affect the Northern Territory (at [284]). The Trial Judge and Full Federal Court

considered some elements of the Claim Group to interfere with the exchange value (the value a reasonable purchaser would pay to extinguish the rights), which are the cultural value (at [285]). The Full Federal Court did something similar when considering the inalienability of the rights, which a reasonable person would not do (at [286]). A reasonable person would only be concerned with extinguishing the encumbrances and, hence, the proper method for determining the exchange value of the non-exclusive native title rights is the reasonable price to extinguish an easement (at [288]). The valuation of extinguishing an easement can be close to 100% of freehold or minimal (at [289]-[292]). Under such a calculation, it would be about 50% of freehold here (at [293]-[303]).

As Edelman J maintains, cultural value is a unique value that is not the exchange value (at [304]). Like non-economic damages in personal injury, this requires translating a non-monetary concept into a monetary figure (at [311]). According to Edelman J, an award for cultural loss is "compensation for the value of the loss of attachment to country and right to live on, and to gain spiritual and material sustenance from, the land", which is "distinct from the subsequent inconvenience and anguish caused by the compulsory manner in which the rights were extinguished", called solatium (at [312]). Loss of amenity occurs at the moment of the injury, while pain and suffering is felt later (at [314]-[315], citing Skelton v Collins (1966) 115 CLR 94). The main flaw with the valuation of cultural loss is that it was an "assessment of cultural value at the date of judgment" (at [318]).

Valuing the Claim Group's cultural losses at $1.3 million could look excessive when compared to a freehold value of $640,000, as argued by the Commonwealth and the Northern Territory, but that, according to Edelman J, demonstrates why the comparison is inapt (at [321]-[322]). If the judgment awards $1.3 million, it means that when extinguishment occurred on 10 March 1994, the value awarded (assuming simple interest) would have been, then, a mere $338,381 (at [322]). That amount is slightly more than half the freehold value at that time.

Although Edelman J agrees in the result, and, hence, would grant that amount, but with interest from the date of extinguishment. Edelman J said, however, “that the spiritual sustenance derived from the land, "the produce of Dreaming…considered to be inviolable"… is plainly not excessive”, but, “indeed, a conservative award” (at [328]).

Edelman agreed with the joint justices that there is no basis for claiming compounding interest “on” the compensation here (at [255], see also [335]-[359]).

Conclusion

Much like every large native title case that Australia’s High Court has decided, *Griffiths* leaves areas undecided. It does not clarify how to value compensation for pastoral leases, mining grants, and agricultural developments or future acts that extinguish or impair but do not extinguish native title rights and interests.

For the foreseen future, it will have a limited impact on New Zealand law or Māori land rights. This case shows that there are many important distinctions between Australian and New Zealand laws that are worth exploration. The main difference is that Australia does not have a treaty like the Treaty of Waitangi. A practical effect is that the Waitangi Tribunal can now hear allegations of breaches dating back to 1840, while in Australia, it has been widely assumed that the NTA only enables claims for compensation related to extinguishment since Australia passed the RDA in 1975. This could change if Australia adopted legislation retroactively extending jurisdiction, as New Zealand did, or if a new case successfully challenges that assumption (Galarrwuy Yunupingu on behalf of the Gumatj Clan or Estate Group, NTD43/2019). If that type of retroactive jurisdiction arises, Australian judges or lawmakers would likely face considerable economic and political opposition and counter-reactions, especially surrounding urban locations where it has been assumed that native title has been extinguished for a long time. Another difference worth noting is that Canadian and, more

recently, New Zealand courts have found that the Crown owes a fiduciary-like duty to native title holders (or their descendants) in some circumstances (*Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423; *Guerin v The Queen* [1984] 2 SCR 335), but Australian courts have yet to articulate one. A barrier in doing so in Australia, as *Griffiths* clarifies, is that the mere existence of native title in a statutory context that facilitates extinguishment is an argument against the establishment of a state-based fiduciary duty for native title purposes.

As the first High Court opinion on the method for calculating compensation arising from the extinguishment of native title, *Griffiths* is a crucial case. The joint justices established precedent for compensating economic values, interest, and the cultural loss experienced by native title holders, which will be immensely helpful to parties to pursuing recognition or extinguishment of native title rights and interests.